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To: Representative John Barker, Chairman
Members of the House Judiciary Committee

From: Lynn R. Johnson, Esq.
Shamberg, Johnson & Bergman, Chartered, Kansas City
On behalf of the Kansas Association for Justice

Date: January 22, 2015

RE: Kansas Judicial Selection Process

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial attorneys. KsAJ strongly supports the Kansas Constitution and its provision for the merit selection, Nominating Commission process for Supreme Court justices established by Kansas voters.

Kansas' Nominating Commission process is the best process to identify qualified and impartial appellate court judges. A professionally qualified and impartial judicial branch is a key part of our democracy; its importance cannot be overstated. The current Nominating Commission process significantly reduces the risk of bias, undue influence, and partisan politics in Kansas' highest court.

Kansas voters established merit selection in the Constitution. Kansas voters amended the Kansas Constitution and established merit selection after the "Triple Play," which has been called one of the most bizarre political events in Kansas history. In 1957, a lame duck governor announced the resignation of the chief justice of the Supreme Court, who was in ill health. The governor then announced his own resignation. Moments later, the lieutenant governor (now governor) appointed the just-resigned governor to fill the vacancy on the Supreme Court. The Triple Play deprived the governor-elect, due to be sworn in within days, of a judicial appointment.

The Triple Play was criticized by members of both the Republican and Democrat parties. To assure that political maneuvering and gamesmanship like the "Triple Play" never happened again, Kansas voters replaced partisan elections of Supreme Court justices with the current constitutional Nominating Commission process in 1958. When the Court of Appeals was created in 1977, the Legislature voted to select Court of Appeals judges by the Nominating Commission process.

Kansas merit selection. When there is an opening on the Supreme Court, the nine member Nominating Commission conducts a thorough analysis of applicants. The process for receiving applicants and selecting three candidates is transparent. Applicant names, qualifications, selection criteria and interviews of applicants are public and open to the press. The Nominating Commission recommends the top three candidates to the governor from the applications received. The governor makes a final appointment selection.

Justices stand for nonpartisan retention election every six years and retire at age 70. Under Article 2 § 28 of the Kansas Constitution, justices (and other constitutional officers) are subject to removal from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. In addition, under Article 3 § 15, justices may be retired after appropriate hearing and upon certification to the governor, by the Nominating Commission, that the justice is so incapacitated as to be unable to adequately perform their duties.

Kansas' current Supreme Court Nominating Commission is the best way to assure justices are accountable to the rule of law and not partisan politics. To uphold the rule of law, judges must be free to make decisions that are unpopular. It follows that the selection process for appellate court judges should be as far removed from political partisanship and pressure as possible. Opponents of merit selection too often describe unpopular decisions by a court or a judge/justice. To change the selection process to control judicial decision making or in hopes of different rulings is hostile to democratic ideals of an impartial judiciary.

The Supreme Court Nominating Commission process reduces any political party's influence on the court. Each governor has the authority to appoint the four non-attorney members (and ultimately, the final of 3 judicial candidates). Kansas attorneys elect the five attorney members from a range of practice areas; one attorney is elected by attorneys in each congressional district, and the chair is elected by attorneys statewide. The mix of lawyers and non-lawyers brings the expertise of those most familiar with the law into the process and also guarantees that the voice of non-lawyer citizens is represented.

The current process has stood the test of time. Opponents cannot provide hard evidence of how and when the current Nominating Commission process failed to achieve fairness and impartiality or produced a justice not meeting the required qualifications. Plans suggested by opponents are a step backward to the days of the Triple Play. They are not merit-based, they are not transparent to the public and press, and they increase the likelihood of political pressure on the courts.

Selection process for Court of Appeals judges. In 2013, the Kansas Legislature passed and the governor signed HB 2019, which eliminated the Nominating Commission process for Court of Appeals judges. The new process empowers the governor to appoint judges. Although the process includes Senate confirmation *after* the governor makes an appointment, the governor alone has authority for identifying and recruiting applicants, and significant discretion regarding whether to disclose his selection criteria or to include the public at all at any point in the process prior to a final announcement of the governor's appointment. Unlike the open and transparent review of applicants performed by the Nominating Commission, the governor's review and selection of his nominee is not open to the public and press.

KsAJ supports returning the selection process for Court of Appeals judges to the current merit selection process for Supreme Court justices. KsAJ supports making no changes to merit selection for Supreme Court justices.